

or by any state or any political subdivision thereof or by any agency thereof or by any entity organized under the laws of the United States or any state thereof which have been issued and sold primarily outside the United States.

7. The Foreign Subsidiaries will accept deposits of Assets pursuant to a written, three-party agreement between (a) a Foreign Subsidiary, (b) Creditanstalt, and (c) a U.S. Investment Company or its custodian. The agreement will provide that Creditanstalt will assume liability for any loss arising out of or in connection with the performance by the Foreign Subsidiary of its responsibilities under the agreement to the same extent as if Creditanstalt had itself been required to provide custody services under the agreement. There will be no difference in the nature or extent of Creditanstalt's liability based on whether such services are provided by the Foreign Subsidiaries directly or as Creditanstalt's delegates.

#### **Applicant's Legal Analysis**

1. Section 17(f) of the Act requires a registered investment company to maintain its securities and similar investments in the custody of a bank meeting the requirements of section 26(a) of the Act, a member firm of a national securities exchange, the investment company itself, or a system for the central handling of securities established by a national securities exchange. Section 2(a)(5) of the Act defines "bank" to include banking institutions organized under the laws of the United States, member banks of the Federal Reserve System, and certain banking institutions or trust companies doing business under the laws of any state or of the United States. The Foreign Subsidiaries do not fall within the definition of "bank" as defined in the Act and, under section 17(f), may not act as custodians for registered investment companies.

2. Rule 17f-5 under the Act permits certain entities located outside the United States to serve as custodians for investment company assets. One such entity is a banking institution or trust company that is incorporated or organized under the laws of a country other than the United States, that is regulated as such by that country's government or an agency thereof, and that has shareholders' equity in excess of U.S. \$200 million. Creditanstalt qualifies as an eligible foreign custodian under rule 17f-5. The Foreign Subsidiaries, however, do not qualify as eligible foreign custodians because they do not meet the minimum shareholders' equity requirement.

3. The purpose of section 17(f) of the Act is to insure that U.S. Investment Companies hold securities in a safe manner that protects the interests of their shareholders. The purpose of rule 17f-5 is to relieve U.S. Investment Companies of the expense and inconvenience of moving assets to a United States bank away from their primary trading market, while at the same time reducing to the extent practicable the risks inherent in maintaining assets outside the United States. The requested exemption is consistent with these purposes and with the protection of investors because, under the proposed custody arrangements, Creditanstalt will be liable for the performance of custody services by each Foreign Subsidiary.

#### **Applicant's Conditions**

Creditanstalt agrees that any order granting the requested relief shall be subject to the following conditions:

1. The foreign custody arrangements proposed regarding each Foreign Subsidiary will satisfy the requirements of rule 17f-5 in all respects other than the Foreign Subsidiary's level of shareholders' equity.

2. Creditanstalt, any U.S. Investment Company, and any custodian for a U.S. Investment Company, will deposit Assets with a Foreign Subsidiary only in accordance with an agreement (the "Agreement") required to remain in effect at all times during which the Foreign Subsidiary fails to satisfy the requirements of rule 17f-5 (and during which such Assets remain deposited with the Foreign Subsidiary). Each Agreement will be a three-party agreement among Creditanstalt, the Foreign Subsidiary, and the U.S. Investment Company or the custodian for a U.S. Investment Company pursuant to which Creditanstalt or the Foreign Subsidiary, as the case may be, will undertake to provide specified custody services. If Creditanstalt is to provide such services, the Agreement will authorize Creditanstalt to delegate to the Foreign Subsidiary such of the duties and obligations of Creditanstalt as will be necessary to permit the Foreign Subsidiary to hold in custody the U.S. Investment Company's Assets. If the Foreign Subsidiary is to provide services directly, no such delegation will be necessary. However, in either case, the Agreement will provide that Creditanstalt will be liable for any loss, damage, cost, expense, liability, or claim arising out of or in connection with the performance by the Foreign Subsidiary of its responsibilities under the Agreement to the same extent as if Creditanstalt had itself been required to

provide custody services under the Agreement. Further, the Agreement will provide that, in the event of loss, a U.S. Investment Company may pursue a claim for recovery against Creditanstalt, regardless of whether the Foreign Subsidiary acted as Creditanstalt's delegate or as direct custodian or subcustodian.

3. Creditanstalt currently satisfies and will continue to satisfy the minimum shareholders' equity requirement set forth in rule 17f-5(c)(2)(i).

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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[Rel. No. IC-21111; 812-9584]

#### **Dean Witter Select Equity Trust**

June 6, 1995.

**AGENCY:** Securities and Exchange Commission ("SEC").

**ACTION:** Notice of application for exemption under the Investment Company Act of 1940 (the "Act").

**APPLICANT:** Dean Witter Select Equity Trust.

**RELEVANT ACT SECTIONS:** Order requested under section 6(c) of the Act that would exempt applicant from section 12(d)(3) of the Act.

**SUMMARY OF APPLICATION:** Applicant requests an order on behalf of its series (the "Series") to permit each Series to invest up to twenty percent of its total assets in securities of issuers that derived more than fifteen percent of their gross revenues in their most recent fiscal year from securities related activities.

**FILING DATE:** The application was filed on May 2, 1995.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on July 3, 1995 and should be accompanied by proof of service on the applicant, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 5th Street NW., Washington, D.C. 20549. Applicant c/o Dean Witter Reynolds Inc., Unit Trust Department, Two World Trade Center, New York, NY 10048, Attn: Thomas Hines.

**FOR FURTHER INFORMATION CONTACT:** Sarah A. Buescher, Staff Attorney, at (202) 942-0573, or Robert A. Robertson, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch.

### **Applicant's Representations**

1. Each Series will be a series of applicant, a unit investment trust registered under the Act. Dean Witter Reynolds Inc. is applicant's depositor (the "Sponsor"). The Sponsor currently intends to offer a new Series four times a year at about the beginning of each calendar quarter.

2. Each Series will invest approximately 20%, but in no event more than 20.5%,<sup>1</sup> of the value of its total assets in each of the five lowest dollar price per share stocks of the ten common stocks in the Dow Jones Industrial Average ("DJIA") with the highest dividend yields either on or shortly before the initial date of deposit (the "Select Five"), and hold those stocks over the life of the Series (presently anticipated to be approximately one year).

3. The DJIA comprises 30 common stocks chosen by the editors of The Wall Street Journal. The DJIA is the property of Dow Jones & Company, Inc., which is not affiliated with any Series or the Sponsor and does not participate in any way in the creation of any Series or the selection of its stocks.

4. The portfolio securities deposited in each Series will be chosen solely according to the formula described above, and will not necessarily reflect the research opinions or buy or sell recommendations of the Sponsor. The Sponsor will have no discretion as to which securities are purchased.

<sup>1</sup> The Sponsor will attempt to purchase equal values of each of the five common stocks in a Series' portfolio and may choose to purchase the securities in odd lots in order to achieve this goal. However, it is more efficient if securities are purchased in 100 share lots and 50 share lots. As a result, the Sponsor may choose to purchase securities of a securities related issuer which represent over 20%, but in no event more than 20.5% percent, of a Series' assets on the initial date of deposit to the extent necessary to enable the Sponsor to meet its purchase requirements and to obtain the best price for the securities.

Securities deposited in a Series may include securities of issuers that derived more than fifteen percent of their gross revenues in their most recent fiscal year from securities related activities.

5. During the 90-day period following the initial date of deposit, the Sponsor may deposit additional securities while maintaining to the extent practicable the original proportionate relationship among the number of shares of each stock in the portfolio. Deposits made after this 90-day period generally must replicate exactly the proportionate relationship among the face amounts of the securities comprising the portfolio at the end of the initial 90-day period, whether or not a stock continues to be among the Select Five.

6. A Series' portfolio will not be actively managed. Sales of portfolio securities will be made in connection with redemptions of units issued by a Series and at termination of the Series. The Sponsor has no discretion as to when securities will be sold except that it is authorized to direct the trustee to sell securities in extremely limited circumstances, namely, upon failure of the issuer of a security in a Series to declare or pay anticipated cash dividends, institution of certain materially adverse legal proceedings, default under certain documents materially and adversely affecting future declaration or payment of dividends, or the occurrence of other market or credit factors that, in the opinion of the Sponsor, would make the retention of such securities in a Series detrimental to the interests of the unitholders. The adverse financial condition of an issuer will not necessarily require the sale of its securities from a Series' portfolio.

### **Applicant's Legal Analysis**

1. Section 12(d)(3) of the Act, with limited exceptions, prohibits an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter, or investment adviser. Rule 12d3-1(b) under the Act exempts the purchase of securities of an issuer that derived more than fifteen percent of its gross revenues in its most recent fiscal year from securities related activities, provided that, among other things, immediately after such acquisition, the acquiring company has invested not more than five percent of the value of its total assets in securities of the issuer. Section 6(c) of the Act provides that the SEC may exempt a person from any provision of the Act or any rule thereunder, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the

purposes fairly intended by the policy and provisions of the Act.

2. Applicant requests an exemption under section 6(c) from section 12(d)(3) to permit any Series to invest up to approximately 20%, but in no event more than 20.5%, of the value of its total assets in securities of an issuer that derives more than fifteen percent of its gross revenues from securities related activities. Applicant and each Series will comply with all provisions of rule 12d3-1, except for the five percent limitation in paragraph (b)(3) of the rule.

3. Section 12(d)(3) was intended to prevent investment companies from exposing their assets to the entrepreneurial risks of securities related businesses, to prevent potential conflicts of interest, and to eliminate certain reciprocal practices between investment companies and securities related business. One potential conflict could occur if an investment company purchased securities or other interests in a broker-dealer to reward that broker-dealer for selling fund shares, rather than solely on investment merit. Applicant believes that this concern does not arise in connection with its application because neither applicant nor the Sponsor has discretion in choosing the portfolio securities or percentage amount purchased. The security must first be included in the DJIA, which is unaffiliated with the Sponsor and applicant, and must also qualify as one of the five lowest dollar price per share stocks of the ten highest dividend yielding securities in the DJIA.

4. Applicant also believes that the effect of a Series' purchase on the stock of parents of broker-dealers would be *de minimis*. Applicant asserts that the common stocks of securities related issuers represented in the DJIA are widely held, have active markets, and that potential purchases by any Series would represent an insignificant amount of the outstanding common stock and the trading volume of any of these issues. Accordingly, applicant believes that it is highly unlikely that Series purchases of these securities would have any significant impact on the securities' market value.

5. Another potential conflict of interest could occur if an investment company brokerage to a broker-dealer in which the company has invested to enhance the broker-dealer's profitability or to assist it during financial difficulty, even though that broker-dealer may not offer the best price and execution. To preclude this type of conflict, applicant and each Series agree, as a condition of this application, that no company held in the portfolio of a Series nor any affiliate thereof will act as a broker for

any Series in the purchase or sale of any security for its portfolio. In light of the above, applicant believes that its proposal meets the section 6(c) standards.

#### Condition

The Applicant and each Series agree that any order granted under this Application may be conditioned upon no company held in the Series' portfolio nor any affiliate thereof acting as broker for any Series in the purchase or sale of any security for the Series' portfolio.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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[Rel. No. IC-21118; No. 812-9488]

#### Maxim Series Fund, Inc.

June 7, 1995.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of Application for an Order under the Investment Company Act of 1940 ("1940 Act").

**APPLICANT:** Maxim Series Fund, Inc. ("Fund").

**RELEVANT 1940 ACT SECTION:** Order requested under Sections 6(c) and 17(b) for an exemption from Sections 17(a)(1) and 17(a)(2) of the 1940 Act.

**SUMMARY OF APPLICATION:** Applicant seeks an order that would permit the exchange of shares between certain Fund portfolios.

**FILING DATE:** The application was filed on February 21, 1995, and amended on June 5, 1995.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the Application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving Applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 28, 1995, and should be accompanied by proof of service on Applicant in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the requestor's interest, the reason for the request, and the issues contested. Persons may request notification of a hearing by writing to the Secretary of the Commission.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 450 5th Street,

NW., Washington, DC 20549. Applicant, Maxim Series Fund, Inc., c/o Beverly A. Byrne, Esq., 8515 East Orchard Road, Englewood, Colorado 80111.

**FOR FURTHER INFORMATION CONTACT:** Yvonne M. Hunold, Assistant Special Counsel, or Wendy Friedlander, Deputy Chief, at (202) 942-0670, Office of Insurance Products (Division of Investment Management).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application; the complete application is available for a fee from the Commission's Public Reference Branch.

#### Applicant's Representations

1. The Fund is a Maryland corporation registered under the 1940 Act as an open-end, diversified management investment company. The Fund consists of twenty-one investment portfolios, three of which are the subject of this application: (a) Growth Index Portfolio; (b) Value Index Portfolio; and (c) Small-Cap Index Portfolio (collectively, "Portfolios"). Great West Life Assurance Company ("Adviser") serves as the investment adviser to the Fund.

2. Shares of the Portfolios currently are sold in connection with certain tax-qualified insurance contracts to: (a) Future Funds Series Account II, a separate account of Great-West Life & Annuity Insurance Corporation ("GWL&A"); and (b) TNE Series (K) Account, a separate account of The New England Life Insurance Company. Shares of the Portfolio may be offered in the future to other separate accounts of GWL&A or of other insurance companies.

3. The investment objectives of the Portfolios are related to corresponding indices of the Frank Russell Company ("Russell"). The investment objectives of the Value Index Portfolio, the Growth Index Portfolio and the Small-Cap Index Portfolio are to provide investment results, before fees, that correspond, respectively, to the total return of the Russell 1000 Value index, the Russell 1000 Growth Index, and the Russell 2000 Index. Under normal circumstances, a minimum of 65% of each of the Portfolio's net assets will be invested in securities included in the corresponding Russell Index.

4. On May 31, of each year, the Russell 1000 Index (of which the Russell 1000 Growth Index and Russell 1000 Value Index are subsets) and the Russell 2000 Index are reconstituted to reflect changes in the marketplace.<sup>1</sup> Consequently, some stocks previously

included in one Russell index, or its subset index, may thus become part of the other Russell index, or its subset. Following the reconstitution of the Russell indices, a corresponding reconstitution of the Portfolios occurs, on or about June 30 of each year, consistent with each Portfolio's respective investment objectives.

5. The Portfolios thus propose to directly purchase from and sell to each other their respective portfolio securities in private transactions ("Reconstitution Transactions"),<sup>2</sup> as follows:<sup>3</sup>

a. *Growth Index Portfolio:* As a direct result of the reconstitution of the Russell 1000 Growth Index, the Growth Index Portfolio proposes to sell specific portfolio securities, and the Value Index Portfolio or the Small-Cap Index Portfolio simultaneously propose to purchase those same securities, as a direct result of the reconstitution of the Russell 1000 Value Index or the Russell 2000 Index, respectively;

b. *Value Index Portfolio:* As a direct result of the reconstitution of the Russell 1000 Value Index, the Value Index Portfolio proposes to sell specific portfolio securities, and the Growth Index Portfolio or the Small-Cap Index Portfolio simultaneously propose to purchase those same portfolio securities as a direct result of the reconstitution of the Russell 1000 Growth Index or the Russell 2000 Index, respectively; and

c. *Small-Cap Index Portfolio:* As a direct result of the reconstitution of the Russell 2000 Index, the Small-Cap Index Portfolio proposes to sell specific portfolio securities, and the Value Index Portfolio or the Growth Index Portfolio simultaneously propose to purchase those same portfolio securities as a direct result of the reconstitution of the Russell 1000 Value Index or the Russell 1000 Growth Index, respectively.

6. Applicant proposes that cash consideration be paid by one Portfolio to another Portfolio only to the extent of the net difference in the aggregate purchase price of the securities bought or sold between two Portfolios. The remaining consideration will be paid

<sup>2</sup> Applicant represents that the Reconstitution transactions will not include any purchases or sales in which any of the Portfolios are both buyers and sellers of the same Portfolio securities.

<sup>3</sup> Applicant statutes that the Portfolios also may purchase or sell Portfolio securities as a direct result of the reconstitution of the respective Russell indices that are not being simultaneously sold to or purchased by another Portfolio because either: (i) the newly reconstituted Russell Index contains different stocks than previously were included, or (ii) the Portfolios do not exactly match their corresponding Russell indices. Applicants represent that these sales and purchases are not deemed to be Reconstitution Transactions and, therefore, are not the subject of this application.

<sup>1</sup> The Russell 100 Index and the Russell 2000 Index are subsets of the Russell 3000 Index.